(3)

No. 91-338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JESSE J. SANCHEZ, VICTOR TORRES and ROBERT CARO,
Petitioners,
vs.
CITY OF SANTA ANA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTIONAL STATEMENT

Respondents City of Santa Ana, Chief Davis, Captains Hansen and Stebbins, Lieutenants Williams, Lewellen, Sterzer and Pitzer and Sergeant Bruns (hereinafter collectively referred to as "defendants") adopt Petitioner's Jurisdictional Statement.[1/]

PRELIMINARY STATEMENT

This case, originally filed in 1979 by Jesse J. Sanchez, Victor Torres and Robert Caro (hereinafter "plaintiffs") has now been before the federal courts for over twelve (12) years. In a final attempt to perpetuate this seemingly unending litigation, plaintiffs have

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1/ The other nine defendants are not named as parties to this Opposition (although they join in the Opposition) as the Ninth Circuit did not remand any claims brought against them, they are: Donald Bott, Lieutenant Drummond, Sergeants McClain, Dixon, Collins, Faust, McDaniel, Lanners and Dittus.

filed this Petition for Writ of Certiorari, in essence asking this Court to retry the case, make new factual determinations and unnecessarily decide legal issues which either were not raised in this case or are matters already decided in accordance with well-established law. Thus, defendants respectfully submit that this Court need not consider the issues raised herein and that the Court should deny this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Due to plaintiffs' distortion of the relevant facts throughout their Petition, without any attempt to cite to the evidence, it is necessary for defendants to

state the facts fully and accurately in their Opposition.[2/]

I. THE SANTA ANA POLICE DEPARTMENT'S AFFIRMATIVE ACTION EFFORTS.

Beginning in 1973, the Santa Ana Police Department ("SAPD") and the City of Santa Ana ("the City") took several voluntary steps to increase the SAPD's minority recruitment. First, as a result of the SAPD's voluntary participation in the MORE program (Minority Office Recruitment Effort) [RT 2876:14-2877:9], many new police officer positions were made available in the SAPD during 1973-74. Second, the SAPD worked in particular to recruit Latino and Hispanic police officers through what became known

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2/ Plaintiffs have already been found to have mischaracterized the record to the Court below. [Appendix H.19] Those actions continue before this Court unrestrained.

as the Community-Oriented Policing ("COP") program. [RT 2877:13-2878:20] Third, Chief Davis, together with the City's Personnel Department, developed the Bilingual Lateral Transfer Program to allow experienced Latino police officers to transfer from other departments into the SAPD. [Appendix H.6; RT 2878:21-2880:4]

The COP Program and the Bilingual Lateral Transfer Program began in 1974, two full years before the federal court decision in a discrimination case filed by a group of Latinos. See League of United Latin American Citizens (LULAC) v. City of Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976). Thus, plaintiffs erroneously state in their Petition that they were hired "in response to a Title VII lawsuit filed against the [SAPD]," citing the LULAC decision. (Petition, page. 6) In

fact, they were hired between 1975 and 1977 as part of the COP Program and the Bilingual Lateral Transfer Program. [Appendix H.7]

Despite the affirmative action efforts of Chief Davis and the City, two separate incidents occurred in late 1977 and early 1978 which led plaintiffs to file this action. First, in November 1977, the City Personnel Department announced that it wished to lower the passing grade for the written examination for the position of Sergeant in order to allow more Latino officers to pass the examination, which the officers had already taken. Several officers in the SAPD became concerned that the lowering of the passing scores might detract in general from the achievement of the position of Sergeant. [RT 4609:9-15; 4609:24-4610:3] Chief Davis likewise

voiced his concerns that it was inappropriate to change the process in midstream, after the test had already been given. [RT 3089:17-3090:21; 3094:25-3095:8]

In their Petition, plaintiffs entirely mischaracterize Chief Davis' opposition to the City's plans to modify the Sergeant's examination by stating, "Chief Davis intentionally incited the Anglo officers against the plan by misrepresenting it, giving a distorted interpretation of the law, and encouraging resistance." (Petition, page 10) Rather, there was merely a natural and legitimate difference of opinion among the officers, which was not drawn along ethnic lines, and which Chief Davis did not intentionally "incite." Indeed, plaintiffs cite no evidence to support this inflammatory charge.

Second, in December 1977, an SAPD police officer (who was not named as a defendant in this action) copied a single cartoon depicting a Black Santa Claus climbing out of a house with his sleigh apparently filled with the house's furnishings. Some SAPD employees (none of whom were named as defendants) then copied the cartoon, and on one copy some derogatory comments were added to the cartoon by one officer (who likewise was not named as a defendant). [Ex. 70:66-70:68; Ex. 10]

When the cartoon was brought to Chief Davis' attention, he ordered an immediate investigation of the incident and eventually ordered discipline or written reprimands against seven (7) employees who were involved or who failed to take proper action against those who were involved. Of the seven disciplined

or reprimanded, none was named as a defendant herein.

At or around the time that the Santa Claus cartoon was circulated, plaintiff Jesse Sanchez ("Sanchez") learned of the cartoon and obtained a copy, but he failed to bring it to the attention of senior officers within the SAPD and instead took it to an agency outside the SAPD. After Chief Davis' investigation, Sanchez received a written reprimand for failing to first bring the cartoon to the attention of his supervisors through the SAPD's chain of command policy. In reprimanding Sanchez, Chief Davis defended his right to complain, but found that in order to promote the good order of the police department and to ensure good public service, employees should bring such serious matters to the attention of their supervisors within the SAPD. [RT 3028:23-3039:15, 3043:1-5]

As a result of the written reprimand, Sanchez was not suspended, he received no time off, he lost no money or benefits, and he suffered no economic harm. [RT 2131:5-10] He received only an admonition to use the SAPD grievance procedure in the future. [Exh. 36] That Sanchez's employment did not suffer as a result of the reprimand is illustrated by the fact that Sanchez received a merit pay step increase only eight (8) days after the written reprimand, resulting in an increase in pay of $75.00 per month. [RT 2131:11-19]

II. ALLEGED DISCRIMINATORY ENVIRONMENT AT THE SAPD.

Plaintiffs allege (on pages 8-10 of the Petition) that there was a "prevalence of racial slurs and jokes" which created a "discriminatory workplace

environment" in the SAPD. The District Court found that this claim was unfounded and frivolous, and the Ninth Circuit panel after reviewing over 70 volumes of trial testimony, also rejected this claim, finding that there was insufficient evidence to convince a reasonable jury that a "hostile work environment" existed. [Appendix H.19]

Moreover, plaintiffs do not once cite to the record to illustrate the alleged evidence of "racial slurs." In fact, the record shows that plaintiffs presented no evidence of a "prevalence of racial slurs." Plaintiff Sanchez admitted at trial that defendants Stebbins, Lewellen, Pitzer, Bruns and McClain never made a racial slur in his presence. [RT 2132:11-2134:20] Similarly, plaintiff Victor Torres admitted that he was not aware of any racial slur

uttered by anyone with the rank of Sergeant or above in the relevant time period. [RT:8863-8865]

Thus, both Sanchez and Torres, the only two plaintiffs who have brought a "discriminatory environment" claim, admitted at trial that they were not aware of racial slurs. Accordingly, Petitioners mischaracterize the evidence (and ignore the factual findings of the District Court and the Ninth Circuit Court of Appeals) by consistently stating that there was "substantial evidence of pervasive and uncorrected racial and ethnic slurs and jokes" (page 2), and that there were "virulent and racist comments" (page 10), thus creating a racially discriminatory workplace environment in the SAPD. This Court should not be asked to serve as a super fact-finder after two lower courts have

reviewed the record and found no discriminatory work environment existed.

III. THE FORMATION OF THE LATINO PEACE OFFICERS ASSOCIATION.

In January 1978, following the proposed changes to the Sergeant's examination and the cartoon incident, plaintiffs, along with thirteen (13) other SAPD employees, formed an Orange County Chapter of a statewide organization known as the Latino Peace Officers Association ("LPOA"). [Appendix H.7] The LPOA requested a closed meeting with Chief Davis to discuss what they believed were problems felt by the minority officers in the SAPD. However, in order to allow all minority officers (and not just those 16 LPOA members) to air their concerns, Chief Davis scheduled an open meeting in the City Council chambers on

January 13, 1978. [RT 2168:1-5; 3107:14-17; Ex. 6]

At the January 13 meeting, Chief Davis made it clear that he considered racial or ethnic slurs to be derogatory, and declared that racial or ethnic discrimination in the SAPD would not be tolerated. [RT 1982:21-25; 3107:14-3109:3] Chief Davis also immediately ordered Captain Gene Hansen to assign two of his best officers, Lieutenant Salazar (who was not named as a defendant) and Lieutenant Lewellen to investigate the LPOA's charges of incidents of perceived discrimination. [Appendix H.7]

Following their six (6) week investigation, during which they interviewed virtually everyone in the SAPD, Lieutenants Salazar and Lewellen noted some isolated incidents of inappropriate language; however, they did not find any

pervasive racial discrimination or related problems, as suggested by the LPOA. [Appendix H.7; Exh. 36] Nonetheless, Chief Davis discussed the findings and his concerns regarding the isolated incidents in an internal, but department-wide, publication. He stressed the need for everyone to recognize the rights of all employees and to respect the sensitivities of fellow employees, particularly the sensitivities of subordinate employees. [Exh. 36]

IV. CARO'S TERMINATION FROM THE SAPD AND HIS APPEALS OF THE DECISION TO TERMINATE HIS EMPLOYMENT.

After Chief Davis ordered that the January 13 LPOA meeting be open to the entire SAPD, plaintiff Caro made a very serious and untruthful allegation against a fellow Anglo officer, claiming the

officer had used excessive force against an arrestee in the line of duty. [Ex. 69; Appendix H.8] Following an extensive investigation, Caro's allegation was proven to be false. Caro was terminated from the SAPD for making a false accusation regarding the excessive use of force and for being untruthful during the resulting investigation. [Appendix H.8; Ex. 35; Ex. 69]

Caro challenged the SAPD's decision to terminate him for making false charges and being untruthful, in an open hearing before the City's Personnel Board. In August 1978, following a lengthy hearing in which Caro presented testimony by several witnesses and had an opportunity to subpoena any number of witnesses he desired, the Personnel Board upheld the termination of Caro's employment. [Appendix H.8; ER 283:3-10]

Caro then appealed the Personnel Board's determination to the California Superior Court. The Superior Court likewise found that Caro was terminated because of his false accusation and his untruthfulness, that the termination was proper, that he was not discriminated against, that the Personnel Board did not refuse or fail to admit evidence which should have been admitted, and that Caro had a fair hearing. [Appendix H.8; ER 623-28] In particular, the Superior Court found that all state and federal requirements of due process and equal protection were met. Id.

Caro also appealed the Superior Court's decision to the California Court of Appeals. The Appellate Court denied his appeal, finding that Caro was properly terminated because of his false accusation and untruthfulness and that he

had a fair hearing, both before the Personnel Board and before the Superior Court. [Appendix H.8; ER 343:24-25] Moreover, the Court of Appeals found that Caro had a full and fair opportunity to subpoena "a large number of witnesses." [ER 639]

Plaintiffs claim in their Petition that a total of twelve (12) officers recanted and refused to testify at Caro's termination hearing. Nowhere do they name these twelve officers or cite any evidence to show that the officers were in any way intimidated into not testifying by defendants' actions. (Petition, pages 13-14) No such evidence exists and both the District Court and the Ninth Circuit below rejected these claims.

On pages 14-15 of their Petition, plaintiffs further mischaracterize the

nature of Caro's state proceedings. They refer to "false testimony" and "lies" by Chief Davis without in any way establishing the basis for these unwarranted allegations. They also entirely ignore the fact that both the District Court and the Ninth Circuit found that Christine Schuller, a witness who Caro apparently mistakenly believed would support him, elected not to testify in support of Caro (and that she signed a Declaration under oath to that effect). [Appendix H.18] Indeed, the unsupported contentions stated as "Facts" in the Petition are precisely what plaintiffs unsuccessfully attempted to prove at trial.

V. PROCEDURAL HISTORY OF THE CASE.

Plaintiffs filed suit on May 18, 1979 against the SAPD, the City, Chief Davis and various SAPD police officers,

alleging intentional discrimination, retaliation and obstruction of justice in Caro's state proceedings, in violation of 42 U.S.C. §§ 1981, 1983, 1985(2), 1986 and 2000e. On June 3, 1983, the District Court granted partial summary judgment in favor of defendants as to most of plaintiff's claims.[3/] After hearing 39 days of trial testimony by plaintiffs on each of their claims, the District Court found that plaintiffs had presented insufficient evidence to support their discrimination, retaliation and obstruction of

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3/ Sanchez was also granted partial summary judgment in his favor on his claim that the procedure utilized by the City for removal of his merit pay constituted a technical procedural due process violation and led to his constructive termination. At the damages phase of the trial, Sanchez was awarded $400,000 in lost wages and $500,000 on his emotional distress claim. The Ninth Circuit Court of Appeals has affirmed the $400,000 award and vacated the $500,000 award for emotional distress in the companion decision to this case. Sanchez v. City of Santa Ana, 915 F.2d 424, 431-32 (9th Cir. 1990), cert. denied., __ U.S. ___ (Oct. 7, 1991).

justice claims. Thus, the District Court directed a verdict in favor of the defendants and against plaintiffs on all remaining claims. [ER 421] The District Court further found "that plaintiffs' pursuit of this case has by and large constituted a serious abuse of the judicial process." [ER 421]

On appeal, the Ninth Circuit below reviewed over 70 volumes of testimony and affirmed the District Court, except with respect to three distinct holdings. First, the Ninth Circuit found that the District Court incorrectly applied the LULAC decision to lateral transfers, and thus remanded plaintiffs' pay and promotion claims. [Appendix H.15] Second, the Ninth Circuit remanded Sanchez's and Torres' First Amendment claims, due to the existence of some evidence to support a possible finding of

retaliation for their speech [Appendix H.21]; the Ninth Circuit also found, however, that it was not retaliatory or unreasonable for the SAPD to have required Sanchez to abide by the SAPD's chain of command policy. [Appendix H.23] Third, the Ninth Circuit held that the District Court incorrectly granted defendants their attorneys' fees and remanded for a determination of the amount of attorneys' fees to which Sanchez may be entitled on his procedural due process claim. [Appendix H.28-29] Of the original eighteen defendants, the Ninth Circuit remanded this case as to only nine.

ARGUMENT

I. THE COURT SHOULD NOT DISTURB THE NINTH CIRCUIT'S DETERMINATION THAT

IT WAS REASONABLE FOR THE SAPD TO REQUIRE SANCHEZ TO FOLLOW THE INTERNAL CHAIN OF COMMAND POLICY.

The Ninth Circuit below affirmed the District Court's determination that defendants were entitled to a directed verdict on Sanchez's claim that he was retaliated against for exercising his First Amendment rights in violation of 42 U.S.C. § 1983. In so doing, the Ninth Circuit followed well-established federal law and struck a balance between the employee's interest in freely expressing himself and the public employer's interest in efficient performance of public service, finding that the SAPD's chain of command policy was "reasonable and not arbitrary." [Appendix H-23]

Plaintiffs completely distort the holding below and argue that, in so holding, the Ninth Circuit conflicted

with other circuits by establishing that, as a rule, an employee cannot complain about discrimination to his or her affirmative action officer ("AAO") without first following an internal grievance procedure. (Petition, page 20) This, however, is a tortured reading of the Ninth Circuit's decision. This case does not present the situation, as plaintiffs suggest, of a public employee who was punished (e.g., demoted, harassed, terminated) for reporting discriminatory conduct. Rather, it is undisputed that Sanchez completely ignored the SAPD's chain of command, thereby disrupting the police force, the rest of the City offices and the community [RT 2998-99], and preventing the SAPD from resolving the issue internally.

A. Under Well-Established Law, it Was Not Unreasonable for the SAPD to Require its Employees to Report Grievances to Their Superiors.

As the Ninth Circuit below recognized, this Court's decisions mandate a balancing test to determine whether a public employer's grievance procedure (or chain of command policy, as in this case) violates the First Amendment and Section 1983 rights of public employees. For 23 years, since this Court's decision in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968), federal courts have balanced the public employer's interest in promoting the efficient service provided by its public workforce against the employee's interest in speaking on a matter of public concern. See also, Connick v.

Myers, 461 U.S. 138, 147, 150-54, 103 S.Ct. 1684, 1690, 1692-94 (1983) (no Section 1983 claim by assistant district attorney who protested her transfer by distributing a "questionnaire" which criticized superiors and office morale).

Plaintiffs herein have not demonstrated why this Court should find that this balancing test should weigh against the SAPD's chain of command policy. Instead, they have created the appearance of a conflict with other Circuits by straining decisions completely loose from their actual holdings. For example,in Hickory Fire Fighters Assn. v. City of Hickory, 656 F.2d 917, 920-21 (4th Cir. 1981), the Fourth Circuit expressly found that there was no indication that it would undermine the efficiency of the Fire Department for the fire fighters to bring their wage concerns before the city

council. Hickory Fire Fighters, 656 F.2d at 920. Here, on the other hand, Sanchez failed to bring the cartoon to the attention of supervisory officers and, instead, took a copy of the cartoon to a City agency in order to bring his complaint outside of the SAPD, resulting in a great deal of morale problems and disruption of the public service provided by the SAPD's officers, and the community at large.[4/]

Similarly, in Wulf v. City of Wichita, 883 F.2d 842, 857, 860-61 (10th Cir. 1989), the Tenth Circuit determined

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4/ Indeed, because petitioner Sanchez took the problem of the cartoon outside the SAPD, "ultimately, it got to the press" [RT 2998], and the resulting publicity created "major problems for [SAPD] in the community," harming a five-year-long effort to improve relations between the Police Department and the City's African-American population, which had been strained. [RT 2998-99] In contrast, had the chain of command been respected, the SAPD could have -- and no doubt would have -- handled the problem quietly without inflaming one of the constituencies it serves.

that there was insufficient evidence of any disruption of the operations of the police department caused by the plaintiff's letter to the attorney general, in which he insisted on confidentiality and reported misappropriation and misuse of public funds and sexual harassment. Wulf, 883 F.2d at 862. Rather, in Wulf, the court found that the plaintiff's supervisor would not have realized the impropriety of his conduct if the plaintiff had not reported it to the attorney general. Id. Here, on the other hand, the operations of the SAPD were disrupted by Sanchez's bringing the cartoon to the Personnel Department, without first bringing it to the attention of his superiors within the SAPD. Moreover, unlike the plaintiff in Wulf, Sanchez had a choice -- if Sanchez had followed the SAPD chain of command, the matter would

have been brought to the attention of the Chief of Police and others who truly needed to know about any inappropriate conduct within the Department.

Moreover, due to plaintiffs' distorted reading of the Ninth Circuit's opinion, plaintiffs' erroneously rely on Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986). In Vinson, the defendant argued that the plaintiff should have been required to complain first to her direct supervisor, the perpetrator of the sexual harassment, and that her failure to do so completely barred her lawsuit. Unlike the policy at-issue in Vinson, the SAPD's chain of command, on the other hand, allowed for a step-by-step reporting procedure, which extended far beyond the immediate supervisor. Furthermore, the SAPD's chain of command did not require Sanchez to first

complain to the alleged "perpetrators" of the cartoon (who were rank and file officers, not within Sanchez's chain of command). For the same reason, plaintiffs' reliance on Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983) and Atcherson v. Siebenmann, 605 F.2d 1058 (8th Cir. 1979) is also misplaced.

Furthermore, contrary to plaintiffs' claims in the Petition (page 25), unlike the Bank in Vinson, defendants herein are not arguing that the SAPD's chain of command "insulates them from liability." Rather, the SAPD is only asserting that under Pickering's balancing test, it was not unreasonable or unlawful for the SAPD to issue plaintiff a single reprimand (without any effect on his salary or conditions of employment) for his failure to report his grievances first to his superiors within the SAPD, and disrupting

the SAPD by taking the cartoon to an outside agency before giving the department an opportunity to take actions against the perpetrators. Finally, in Vinson, the bank had no strong interest in enhancing the efficient service of its employees, an interest which this Court has repeatedly recognized belongs to public employers and which is a weighty factor under Pickering.

Plaintiffs' argument that Sanchez should have been immune from criticism for failing to bring the cartoon to the attention of SAPD supervisors suggests that employers (and in this case, a police department charged with the enforcement of laws) cannot ask or expect its employees (in this case, police officers) to report inappropriate conduct by other employees to management. Clearly, plaintiffs' contention that a

police department cannot criticize a police officer for failing to report to management the inappropriate conduct by other police officers and that any such criticism violates a police officer's civil rights, is untenable.

Finally, Sanchez was not reprimanded due to the message he conveyed, but rather on account of the manner and the timing with which it was conveyed. Accordingly, the mild rebuke given to Sanchez was authorized under federal law, and plaintiffs inflate the minimal importance of the issue they have attempted to create. See Barnes v. Glen Theatre, Inc., ___ U.S. ___, 111 S.Ct. 2456, 2461 (1991) (plurality) (a government regulation affecting time and manner of speech is justified if it furthers an important or substantial interest); Heffron v. International Soc'y for

Krishna Consciousness, 452 U.S. 640, 654 (1981) (place and manner considerations justified restricting protected activity to one location).

In sum, the Ninth Circuit correctly applied this Court's well-established test for First Amendment/Section 1983 claims brought by public employees and affirmed the District Court's directed verdict in favor of the City. Plaintiffs' tortured interpretation of the holding below should be rejected.

B. Sanchez Did Not Suffer "Retaliation" Sufficient to Constitute a Violation of Section 1983.

Plaintiffs repeatedly state that Sanchez was "punished" for bringing the cartoon outside of the SAPD's chain of command. Actually, Sanchez was given

only a single written reprimand and admonition, with no adverse effect on the terms or conditions of his employment. [Appendix H.7]

Thus, Sanchez was not "deprived of any rights, privileges, or immunities" under the standards defining a violation of Section 1983. The reprimand did not even affect Sanchez's pay, benefits or chance for promotion. [ER 426] The various Circuits agree that such a criticism does not constitute a deprivation of property to support a Section 1983 claim. See e.g., Barkoo v. Melby, 901 F.2d 613, 620 (7th Cir. 1990) (threats of disciplinary action in the future did not support claim for retaliation under Section 1983); Daly v. Sprague, 675 F.2d 716, 726-27 (5th Cir. 1982), cert. denied 460 U.S. 1047 (1983) (suspension of tenured medical school

professor's hospital privileges, where no affect on tenured employment or salary, did not state a claim for deprivation of a property or liberty interest under Section 1983); see also, Hale v. Marsh, 808 F.2d 616, 619 (7th Cir. 1986) (no Title VII remedy where plaintiff alleged "retaliation" based only on a critical letter put in employee's personnel file).

In sum, plaintiffs ask this Court to address legal issues which do not exist, and to cross the grain of well-established federal law. For these additional reasons, this Court should deny plaintiffs' Petition as to their Section 1983 claims.

II. THE COURT SHOULD NOT GRANT CERTIORARI AS TO THE NINTH CIRCUIT'S DETERMINATION THAT PLAINTIFFS FAILED TO PRESENT ANY EVIDENCE OF A

CONSPIRACY IN VIOLATION OF SECTION 1985.

A. Plaintiffs Once Again Have Distorted the Ninth Circuit's Decision Below, and in so Doing, are Asking this Court to Decide Issues of Fact.

In affirming the District Court's granting of directed verdicts as to plaintiffs' claims under Section 1985, the Ninth Circuit essentially reached three holdings: (1) Caro's claims under Section 1985(2) failed because (a) Caro failed to produce evidence that Community Service Officer Christine Schuller was intimidated by defendants into not testifying, and (b) Caro's claims were barred by issue and/or claim preclusion [Appendix H.18], and (2) there was insufficient evidence of a conspiracy to

obstruct justice in this very case to support the Section 1985(2) claim brought by all of the plaintiffs. [Appendix H.25] Thus, contrary to plaintiffs' tortured description of the Ninth Circuit's decision below, the Ninth Circuit actually held that based on a review of the extensive testimony presented at trial, all three plaintiffs simply failed to present sufficient evidence of a conspiracy to obstruct justice in the federal or state courts, and thus failed to state a claim under 42 U.S.C. § 1985(2). [Appendix H-18, 25]

Despite plaintiffs' attempt to cleverly disguise their Petition for Writ of Certiorari as a challenge to the legal basis for the Ninth Circuit's decision both herein and in the irrelevant David v. United States, 820 F.2d 1038 (9th Cir. 1987) case (which was decided four years

earlier and not relied upon by the Ninth Circuit in deciding this case), plaintiffs are in essence asking this Court to make a factual determination. They are asking this Court to re-evaluate both the District Court's and the Ninth Circuit's decision, that there was insufficient evidence of a conspiracy to obstruct justice. The factual dispute which plaintiffs ask this Court to resolve is clearly an inappropriate basis for a Petition for Writ of Certiorari.

Moreover, even if plaintiffs are correct in their interpretation of the Ninth Circuit's holding, plaintiffs failed to preserve the issue. Before the Ninth Circuit, plaintiffs only vaguely alluded to the argument and evidence they now rely upon. Hence, that Court's failure to consider the issue most likely resulted from a conclusion that it had

been waived. See Northwest Acceptance Corp. v. Lynwood Equip., Inc., 841 F.2d 918, 924 (9th Cir. 1988) (waiver found because insufficient argument had been presented).

If preserved, the issue is of minimal importance because it is redundant. To the extent that the claim rests upon intimidation of and retaliation against petitioners themselves as parties and as witnesses for each other, a jury "will determine whether the First Amendment has been violated, and by whom, and what damages if any would be required to repair any injuries caused" by these acts. [Appendix H.23] Whether redress could also be sought under section 1985(2) is therefore a moot point.[5/]

5/ Intimidation of non-party witnesses also is forbidden by the First Amendment, see e.g., (continued...)

Finally, in any event, the issue is of but passing interest since the analysis contained in David is clearly correct. The applicable remedial provision of the statute "limits recovery to 'the party so injured or deprived,'" Rylewicz v. Beaton Servs., 698 F.Supp. 1391, 1397 (N.D. Ill. 1988) (quoting 42 U.S.C. § 1985(3) (1988)) (emphasis in Rylewicz), aff'd, 888 F.2d 1175 (7th Cir. 1989), as does the companion statute dealing with prevention of conspiracies, 42 U.S.C. § 1986 (1988). This language "shows that Congress intended to provide a damage remedy only for litigants whose right to pursue a claim in federal court has been hindered by a conspiracy or by

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5/ (...continued)
Melton v. City of Oklahoma City, 879 F.2d 706, 714 (10th Cir. 1989); Smith v. Hightower, 693 F.2d 359, 368 (5th Cir. 1982) (Wisdom, J.), although obviously the witnesses must pursue the resulting claim themselves.

'neglect or refusal' to aid the prevention of the conspiracy." Rylewicz, 888 F.2d at 1180 (quoting § 1986). "Otherwise the term 'witness' would have been included in these remedial provisions." Id.

The task of construing the scope of Section 1985(2) "begins where all such inquiries must begin: with the language of the statute itself." United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989). "In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" Id. (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

B. The Ninth Circuit Correctly Held that Caro's Section 1985

Claim is Barred by Issue and/or Claim Preclusion.

In his Section 1985(2) claim before the District Court, Caro alleged that the defendants conspired to obstruct justice and deter witnesses who might have testified in his hearing before the City of Santa Ana Personnel Board.[6/] In affirming this holding, the Ninth Circuit determined that Caro had the opportunity to appeal the Personnel Board's denial of his request for reinstatement in two separate proceedings before both the California Superior Court and the California Court of Appeals, both of which denied him relief. [Appendix H.8, 17] Moreover, the Ninth Circuit recognized that in rejecting his claim

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6/ It is unclear, however, whether Caro also claims obstruction of justice in his two appeals of the Personnel Board's determination before the California Superior Court and the California Court of Appeals.

for reinstatement, the California Court of Appeals expressly found that Caro was afforded a full and fair hearing before the Personnel Board. [Appendix H.17]

Plaintiffs apparently argue that preclusion should not apply to Caro's Section 1985(2) claims because if there were an obstruction of justice in the state courts, Caro did not have an opportunity to litigate that obstruction of justice claim in the previous proceeding. Setting aside the fact that Caro failed to present any evidence that witnesses were, in fact, intimidated or coerced, there are four major flaws with Caro's argument.

First, plaintiffs' argument entirely ignores the facts of this case. Caro had two full opportunities to present his allegation of obstruction of justice occurring in the Personnel Board hearing,

during either of his two appeals. Moreover, Caro did claim that the Personnel Board hearing denied him justice by alleging that the hearing was "unfair." The Court of Appeals rejected this claim, expressly finding that Caro had been given a full and fair hearing and had the opportunity to present "a large number of witnesses." [ER 639]

Second, federal courts have rejected plaintiffs' contention that as a general rule, claim preclusion should not apply to comparable claims brought under Section 1985. In fact, Circuit courts deciding the issue have not hesitated to apply the doctrine of res judicata to bar Section 1985 claims. See, e.g., Concordia v. Bendekovic, 693 F.2d 1073 (11th Cir. 1982) (if state proceedings satisfy requirements of res judicata, claims under sections 1983 and 1985 are barred); Gallagher v. Frye, 631 F.2d 127,

130, n.5 (9th Cir. 1980) (rule of preclusion is applicable to actions brought pursuant to Sections 1983 and 1985); Wilt v. State Board of Education, 608 F.2d 1126, 1128 (6th Cir. 1979), cert. denied 445 U.S. 964 (1980) (claims brought under Sections 1981, 1983 and 1985(3) are barred by res judicata).

Third, whatever may be the abstract form of plaintiffs' contention that an accommodation between Section 1985(2) and 28 U.S.C. § 1738 is necessary (see Petition at page 54), there is neither need nor occasion for their suggested accommodation in the context of this case. Although judicial review of whether Caro received a fair hearing before the personnel board necessarily was based upon an administrative record, the Courts reviewing that record were also free to consider "relevant evidence

which, in the exercise of reasonable diligence, could not have been produced" before the Personnel Board. Cal. Code Civ. Proc. § 1094.5(e). Thus, even if the alleged conspiracy both existed and had the impact that Caro claims it did, he could have raised and proved that point when he sought review.

Finally, resolution of the issue is unnecessary in any event. As plaintiffs point out (see Petition at pages 46-48), a judgment resting upon concealed evidence or intimidation of witnesses will not be afforded preclusive effect anyway. Hence, the only possible explanation for the Ninth Circuit's conclusion that Caro's obstruction of justice claim was barred lies in the fact that Caro failed to make a case, and most certainly did not prove, that any obstruction of justice caused the state court judgment.

Hence, this case just does not present the issue that plaintiffs would have this Court review, whether preclusion doctrines can or should be applied despite such evidence.

In sum, it is ludicrous for plaintiffs to claim that Caro was not given the opportunity to litigate his obstruction of justice claim before the state courts, when two separate appeals were heard, and in both of those appeals, the courts expressly rejected Caro's arguments that justice was not served. If the Court accepts plaintiffs' argument, any time a person felt that he or she did not get a fair treatment in state court, yet raised that argument in the state appellate court only to have it rejected, he or she could then run to federal court and relitigate that claim by claiming obstruction of justice under Section

1985(2). The Ninth Circuit correctly rejected this premise and followed established law to determine that Caro's Section 1985(2) claim was barred as it had already been litigated.[7/]

C. Plaintiffs Fail to Distinguish Between Claims Brought Under Section 1983 and Those Brought Under Section 1985.

On pages 36-40 of their Petition, plaintiffs argue that because the Ninth Circuit panel determined that there may be sufficient evidence of retaliation to support their Section 1983 claims, there is likewise sufficient evidence of a

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7/ If after plaintiff had lost his Personnel Board hearing he had gone directly to Federal Court under a Section 1985(2) claim challenging the failure of the hearing, a different issue would be presented. In this case, however, plaintiff already challenged the fairness of the hearing in two separate appeals, and those decisions preclude re-litigation in federal court.

conspiracy to obstruct justice under Section 1985(2). Plaintiffs completely ignore the differences between Section 1983 and Section 1985. Section 1985(2) requires that plaintiff meet the additional burden of proving (1) a class race-based animus, (2) a conspiracy between two or more people, and (3) an act taken in furtherance of a conspiracy. Compare Griffin v. Breckenridge, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-99 (1971) and Kush v. Rutledge, 460 U.S. 719, 723, 103 S.Ct. 1483, 1486 (1983) (stating elements of Section 1985 violation) with Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913 (1981), overruled on other grounds, 474 U.S. 327 (1986) (stating elements of Section 1983 violation). The Ninth Circuit correctly found that plaintiffs had not met that burden. [Appendix H.24-26] Obviously, even if a

jury were to find the existence of some retaliatory conduct, this is not sufficient to establish that any defendants conspired and acted in furtherance of that conspiracy to support a claim under Section 1985(2).

Moreover, plaintiffs ignore the fact that the Ninth Circuit did consider the incidents of alleged retaliation against them. While concluding that the retaliation claim merited submission to a jury, the Ninth Circuit also concluded that the evidence relating to the "same incidents" was not sufficient "to support a conspiracy claim under 42 U.S.C. § 1983." [Appendix H.24]

In sum, if plaintiffs are correct, whenever a person presents sufficient evidence of retaliatory conduct to succeed under Section 1983, he or she could also successfully claim a conspir-

acy under Section 1985. This, quite simply, has never been the law, and there is no reason in this case for the Court to adopt plaintiffs' unwarranted expansion of Section 1985(2) liability and disturb the Ninth Circuit's decision below.

III. THIS COURT SHOULD NOT DISTURB THE NINTH CIRCUIT'S DETERMINATION THAT PLAINTIFFS ARE NOT ENTITLED TO REMAND OF THEIR DISCRIMINATORY ENVIRONMENT CLAIM.

A. Because Plaintiffs' Discriminatory Environment Claim Under Section 1983 is Based on the Same Facts as Their Title VII Claim, There is No Basis to Have a Jury Review that Claim.

Plaintiffs argue that because the original Ninth Circuit panel (before reconsideration) allegedly found some evidence of a discriminatory environment, plaintiffs should be allowed to have their discriminatory atmosphere claim (brought under Title VII and Section 1981) decided by a jury. Plaintiffs ignore the law of this Court, which the Ninth Circuit followed upon reconsideration, that: (1) there is no right to a jury trial under Title VII, and (2) following this Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 2374-75 (1989), a discriminatory workplace environment is not actionable under Section 1981.[8/]

8/ Plaintiffs feign surprise that defendants did not raise these arguments until their Petition for Rehearing. (See notes 16 and 17 at page 57 of Petition). Obviously, there simply was no need for defendants to raise these issues until they filed their Petition for Rehearing, as the (continued...)

Plaintiffs conveniently ignore that they have never pursued a discriminatory environment claim under Section 1983. Rather, as the Ninth Circuit expressly found below, they have chosen to rely on Title VII and Section 1981 throughout this case. [Appendix H.19][9/] Apparently, as they desperately try to fit their

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8/ (...continued)
District Court had granted a directed verdict in defendants' favor, and it was not until the Ninth Circuit remanded the claims that the issues of a jury trial or liability under Section 1981 even arose.

9/ Plaintiffs completely mischaracterize the record in footnote 19 when they state, "The opening paragraph of the [Ninth Circuit's] opinion expressly states that all claims were based simultaneously under sections 1981 and 1983." Rather, in the opening paragraph of its opinion, the Ninth Circuit was merely stating all of the claims which plaintiffs had brought, and was not describing plaintiffs' discriminatory workplace environment claims in particular. [Appendix H.6] Later in its opinion, the Ninth Circuit specifically stated, "Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII." [Appendix H.19] (emphasis added).

discriminatory environment claim anywhere, plaintiffs now argue that this Court needs to decide whether their discriminatory environment claim is actionable under Section 1983, even though it was never alleged. Plaintiffs incorrectly assume in their Petition that the Ninth Circuit "viewed Patterson and Jett as precluding any remedy for a discriminatory workplace environment except under Title VII." (Petition, page 59)

B. In Any Event the Ninth Circuit has Determined this to be a Non-Issue.

Even were plaintiffs' claims of discriminatory environment found to be meritorious, the Ninth Circuit has already determined, after reviewing all of the evidence plaintiffs presented,

that no jury could have found for plaintiffs. [Appendix H.19] Thus, the Ninth Circuit simply ruled that plaintiffs failed to present substantial evidence of a racially discriminatory workplace environment. This case, consequently, just does not present the issue of whether such a condition is remediable under Section 1983.

C. No Evidence was Produced to Permit Finding the Individual Defendants Liable for Plaintiffs' Discriminatory Environment Claim Under any Legal Theory.

Even if this Court were to accept plaintiffs' argument that a discriminatory workplace environment claim based only on the same facts as a Title VII claim should be decided under a hereto-

fore unasserted Section 1983 claim, plaintiffs incorrectly assume that any evidence was produced to permit a finding that the individual defendants can be held liable for a discriminatory workplace environment under any theory.

This Court first defined liability under Title VII for a "hostile work environment" in Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-67, 106 S.Ct. 2399, 2404-05 (1986). The Court in Vinson, however, did not specifically define the scope of liability of an individual where the allegations involve a hostile work environment. However, several rules concerning individual liability under a hostile/discriminatory environment claim have emerged since Vinson.

First, individual co-workers who are not agents of the employer cannot be

liable under Title VII. 42 U.S.C. § 2000e(b) (for purposes of Title VII, an "employer" is a "person engaged in an industry affecting commerce . . . and any agent of such a person"); Huebschen v. Dept. of Health and Social Services, 716 F.2d 1167, 1170 (7th Cir. 1983) (because individual supervisor was not an "employer" under Title VII, she likewise could not be sued under Section 1983); see also, Guy v. City of Phoenix, 668 F.Supp. 1342, 1351 (D.Ariz. 1987) ("[c]o-workers cannot be sued under Title VII").

Second, only under certain circumstances can supervisory personnel be held liable for the discriminatory acts of their subordinates. Al-Khazraji v. St. Francis College, 784 F.2d 505, 518 (3rd Cir. 1986), aff'd 481 U.S. 604 (1987) (individuals are liable only if they authorized, directed or participated in

the alleged discriminatory conduct); Hendrix v. Fleming Companies, 650 F.Supp. 301, 303 (W.D. Okl. 1986) (individual supervisors not liable for subordinate's conduct; active discriminatory conduct by the supervisor was required); Brown v. City of Miami Beach, 684 F.Supp. 1081, 1085-86 (S.D. Fla. 1988) (same).

Third, Vinson illustrated the type of individual defendant who might be held liable under a hostile/discriminatory workplace environment claim -- one who directly created the hostile environment, thus directly violating Title VII (and/or Section 1983). In Vinson, the plaintiff had been subject to a continuous pattern of sexual comments and sexual harassment by her direct supervisor over a period of four (4) years. Vinson, 477 U.S. at 60, 106 S.Ct. at 2402. Obviously, that supervisor created the hostile workplace

environment. However, these individual defendants cannot be liable for the actions of <u>others</u> which might have had the effect of creating a hostile/ discriminatory workplace environment, unless it was shown that they had knowledge of the actions and actively or passively condoned them. Inherent in the District Court's directed verdict and the Ninth Circuit's affirming of the same is a finding that no such evidence was presented.

Thus, there is absolutely no evidence herein that these individual defendants acted to create a hostile environment within the SAPD, or knew of, or condoned, any such actions. Indeed, the SAPD employees who were primarily responsible for the cartoon incident were not named in this lawsuit, but were disciplined for their conduct. Accord-

ingly, even if this Court accepts plaintiffs' contention that their discriminatory workplace environment claim should be decided by a jury, it cannot be pursued against the individual defendants.

CONCLUSION

In sum, what plaintiffs have attempted to frame as "important questions of law" are actually either based on plaintiffs' distorted interpretation of the decision below, or issues that this Court (and various other Circuits) have already decided. Moreover, plaintiffs are asking this Court to re-evaluate the most basic factual determinations which have already been hashed and rehashed for twelve (12) years. Accordingly, for all of the reasons discussed in detail above,

defendants respectfully submit that plaintiffs' Petition for Writ of Certiorari should be denied.

DATED: October 21, 1991

Respectfully submitted,

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